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MINUTES
JUNE 2, 2006

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 8:17 a.m., on Friday, June 2, 2006, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Heidi Kaiser, Don Marble, Bill Rossbach, Robin Shropshire, Gayle Skunkcap & Kim Lacey

Board Attorney Present: Katherine Orr, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Cheryl Romsa, Romsa Court Reporting

Department Personnel Present: Tom Livers, Deputy Director; John North, Chief Legal Counsel; Keith Christie, Legal; David Rusoff, Legal; Jane Amdahl, Legal; James Madden, Legal; John Arrigo, Administrator, Enforcement Division; Sandi Olsen, Administrator, Remediation Division (REM); David Bowers, REM; Bob Bukantis, Planning, Prevention & Assistance Division; Steve Welch, Administrator, Permitting & Compliance Division (PCD); Bonnie Lovelace, Water Protection Bureau, PCD; Charles Homer, Air Resources Management Bureau (ARMB), PCD; Debbie Skibicki, ARMB, PCD; David Klemp, ARMB, PCD; Jan Brown, ARMB, PCD; Sara Williamson, ARMB, PCD; Mark Hall, Waste & Underground Tank Management Bureau (WUTMB), PCD; Rebecca Holmes, WUTMB, PCD; Ed Thamke, WUTMB, PCD; Warren McCullough, Environmental Management Bureau, PCD; Jon Dilliard, Public Water Supply & Subdivisions Bureau, PCD.

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Jim Parker, PPL Montana; Dustin Stewart, Montana Mining Association; Robin Meguire, Montana Environmental Information Center (MEIC); J. Chris Pfahl, ASARCO; Patti Carrywater, Fort Belknap Tribes; Catherine HalverFort Belknap Island Mountain Protectors; Dean Stiffarm, Sr., Fort Belknap; Tina HasEagle, Fort Belknap; Ed Bartlett, Drowning Law Firm; Don Booth, EMC²; Kermit Horn, Fort Belknap Council; Don Allen, Western Environmental Trade Association; Anne Hedges, MEIC; Tom Schneider.

- I.A. Review and approve minutes of March 23, 2006, regularly scheduled Board meeting.
- Ms. Lacey MOVED to approve the March 23, 2006, meeting minutes. Ms. Shropshire SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- I.B. Review and approve January 10 & 11, 2006, hearings summary pertaining to metal mine reclamation rules.
- Chairman Russell noted a correction in the hearings summary of an extra "L" in his name. He called for a motion to approve the minutes with the correction. Ms. Lacey so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- II.A.1.a In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act, BER 2002-09 MM.
- Ms. Orr had no further information beyond that provided in the agenda.
- II.A.1.b In the matter of violations of the Water Quality Act by ASARCO, Inc., BER 2005-09 WQ.
- Ms. Orr had no further information beyond that provided in the agenda.
- II.A.1.c In the matter of the issuance of the Air Quality Permit for the Roundup Power Project, Permit No. 3182-00, BER 2003-04 AQ.
- Ms. Orr had no further information beyond that provided in the agenda.
- II.A.1.d In the matter of the request for hearing of Jay Gasvoda, d/b/a Gasvoda Construction, BER 2005-17 OC, regarding the Notice of Violation and Statement of Proposed Penalty.
- Ms. Orr said there is a pending motion for sanctions because the appellant has not filed the requested discovery pursuant to an order she issued.
- II.A.1.e In the matter of the request for hearing by Bear Cub, LLC, BER 2006-02 SUB, regarding Sunrise Lots subdivision waiver denial in Missoula County.
- Ms. Orr said a hearing was held in Missoula on May 23 and the decision on that will be presented at the July Board meeting.
- II.A.1.f In the matter of the request for hearing of Michael and Kimberly Thomas, regarding DEQ's approval of the Blahnik Construction, Inc.'s JCSL North Gravel Pit, BER 2006-04 OC.
- Ms. Orr had no further information beyond that provided in the agenda.

II.B.1 In the matter of the briefing regarding EQC involvement with BER rulemakings.

Mr. Livers informed the Board that the EQC had requested information on the coal bed methane, metal mine, and mercury rulemakings. He also said DEQ disagrees with the legal opinion of Todd Everts, that the mercury rulemaking triggers MEPA. Mr. Livers agreed to provide a summary of DEQ's reasons at the next Board meeting.

Mr. North explained that the Department's adoption of a rule does not trigger MEPA. He said each new or modified permit would require a MEPA analysis. He provided further reasoning why DEQ disagrees with Mr. Everts' opinion. Mr. Rossbach and Mr. Marble noted agreement with Mr. North's explanation.

III.A.1 In the matter of the amendment to ARM 17.24.116 pertaining to application requirements for operating permits under the Metal Mine Reclamation Act, as proposed in Montana Administrative Register Notice No. 17-230.

Mr. Livers clarified that the DEQ is recommending the Board not adopt the proposed rule amendments. He summarized the Department's position.

Mr. McCullough provided brief background information of the process for this rulemaking to date.

Mr. Barber discussed several issues that had been brought forward about the petition and the rule: 1) the two-year timeframe; 2) the devastation to industry; and 3) DEQ's opposition to the rule, and proposal for legislation to improve bonding laws. He said improved bonding is not the answer, and that MEIC believes this rule is the best way to address the issues.

Mr. Stiffarm spoke in favor of the rule, and provided details of the BLM's Engineering Evaluation Cost Analysis and the projected shortfall of funds.

Ms. Halver spoke about issues with Pegasus Gold and pleaded with the Board members to consider humans when making their decision.

Ms. Has Eagle spoke in favor of the proposed rule.

Mr. Stewart spoke about Zortman, proposed mines in Lincoln County, and the history of mining regulation and bonding in Montana. He said the Mining Association does not believe this rule is the answer to the issues of mining.

Discussion took place regarding the rule, possible legislation, the possibility of a trust fund, and the minerals being mined. Mr. McCullough responded to questions from the Board.

Chairman Russell called for further public comment on the rulemaking. There was no response.

Mr. Rossbach MOVED to table the rulemaking with the understanding that significant progress would be made toward developing some consensus legislation or rulemaking. Ms. Lacey SECONDED the motion. The motion CARRIED with a 5-2 VOTE.

- III.B.1 In the matter of the Department's request to initiate rulemaking to amend ARM 17.8.501, 17.8.505, and 17.8.514 for the annual adjustment of air quality operation and open burning fees.

Mr. Homer explained a few changes that had been made to the rule notice and said the DEQ recommends the Board initiate the rulemaking and assign a hearings officer.

Chairman Russell called for a motion to initiate the rulemaking and appoint Ms. Orr as the presiding officer. Ms. Lacey so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.

- III.B.2 In the matter of the Department's request to initiate rulemaking to revoke the temporary water quality standards for portions of the Mike Horse Creek, Beartrap Creek and the Upper Blackfoot River, ARM 17.30.630(2), and the Board approved Implementation Plan.

Mr. Bowers said the DEQ had presented a general overview of the temporary water quality standards to the Water Pollution Control Advisory Council (WPCAC) on May 4. He said the presentation had included the conditions under which the statute allows for the Board to terminate a temporary standard: 1) water quality improvement to a point where all designated uses are met; 2) the petitioned water body has been reclassified; or 3) the implementation plan is not being implemented according to the plan's schedule. Mr. Bowers said the presentation also included a summary of the Upper Blackfoot Mining Complex's (UBMC) temporary standards implementation plan – actions initiated or completed, schedule deficiencies (not meeting target dates), and the unlikelihood that cleanup of the public lands could be completed under the temporary standards.

Mr. Bowers said the DEQ has reviewed the possible Board actions and the consequences of such actions. He said WPCAC voted 9-2 in favor of recommending that the Board initiate rulemaking to rescind the temporary standards for the UBMC.

Discussion took place regarding ASARCO's bankruptcy and how that would affect rescinding the standards, and additional actions the Department could then take.

Mr. Pfahl talked about why the temporary standards were originally granted. He said ASARCO had asked for 15 years, but DEQ gave them only 8. He provided several reasons why there have been delays. He said ASARCO will continue cleanup with or without the temporary standards, so revoking the standards does not make sense. Mr. Pfahl said ASARCO is requesting that the temporary standards remain in place and that a more realistic schedule be adopted. Further discussion took place.

Chairman Russell called for public comment. There was no response.

- Ms. Shropshire MOVED for the Board to initiate rulemaking to rescind the temporary water quality standards for the UBMC and to appoint Ms. Orr as presiding officer. Mr. Skunkcap SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.C.1 In the matter of final action on the appeal by Westmoreland Resources, Inc., BER 2005-19 SM, regarding the issuance of a Notice of Violation and Statement of Proposed Penalty.
- Ms. Orr provided a summary of the action before the Board.
- Ms. Lacey MOVED to authorize the Chairman to sign the Order of Dismissal. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.C.2 In the matter of final action on the request for hearing by Oro Management, LLC, BER 2006-01 MM, regarding a challenge to the alleged violations and an assessed penalty.
- Ms. Orr provided a summary of the action before the Board.
- Chairman Russell called for a motion to authorize him to sign the Order of Dismissal. Mr. Rossbach so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.C.3 In the matter of final action on the request for hearing of Blue Bear Minor Subdivision, BER 2006-03 SUB.
- Ms. Orr said the DEQ had issued a revised subdivision certificate to resolve the matter.
- Chairman Russell called for a motion to authorize him to sign the Order of Dismissal. Ms. Lacey so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.C.4 In the matter of final action on the request for hearing of Garfield County regarding a notice of violations of the Opencut Mining Act, BER 2006-08 OC.
- Chairman Russell called for a motion to authorize him to sign the order. Mr. Rossbach so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.C.5 In the matter of final action regarding violations of the Montana Water Quality Act by the City of Lewistown Wastewater Treatment Plant, BER 2004-15 WQ.
- Ms. Orr provided a brief summary of the case.
- Chairman Russell called for a motion to authorize him to sign the dismissal order. Ms. Kaiser so MOVED. Mr. Skunkcap SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.D.1 In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleum, Inc., BER 2003-14 HW.

Ms. Orr explained that Flying J had indicated it wanted to file exceptions. She recommended that the Board table this item until the July meeting.

Mr. Rossbach MOVED to table the matter. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.D.2 In the matter of the Montana Environmental Information Center's appeal of Air Quality Permit No. 3182-01, issued for the Roundup Power Project, BER 2005-21 AQ.

Ms. Orr said she had received a request to file exceptions and that she had not ruled on that request, so she did not think it was appropriate for the Board to act on this matter at this time.

III.E.1 In the matter of the request for hearing of James McDonald, d/b/a McDonald Ready Mix, regarding violations of the Opencut Mining Act, BER 2006-05 OC.

Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner. Mr. Skunkcap so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.E.2 In the matter of the request for hearing of Bruce Wood, d/b/a Big Sky Ready Mix, regarding a notice of violations of the Opencut Mining Act, BER 2006-06 OC.

Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner. Mr. Rossbach so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.E.3 In the matter of the request for hearing of Tom and Noel Gorton, d/b/a Creston Topsoil, regarding a notice of violations of the Opencut Mining Act, BER 2006-07 OC.

Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner. Ms. Kaiser so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.


III.E.4 In the matter of the request for hearing of Kountry Korner Enterprises, d/b/a Kountry Korner Café, regarding violations of the Montana Public Water Supply Laws, BER 2006-09 PWS.

Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner. Ms. Lacey so MOVED. Ms. Kaiser SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.E.5 In the matter of the request for hearing of Scanlan Construction regarding a notice of violation of the Opencut Mining Act, BER 2006-10 OC.

- Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner. Ms. Lacey so MOVED. Mr. Skunkcap SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.E.6 In the matter of the request for hearing of Thomas M. Thomas, Pointe of View Ranch, regarding a notice of violations of the Water Quality Act, BER 2006-11 WQ.
- Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner. Ms. Kaiser so MOVED. Mr. Rossbach SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- III.E.7 In the matter of the request for hearing of Linda Christensen regarding the Final Environmental Assessment for Russell Olsen's proposed Pavoco Gravel Pit, BER 2006-12 OC.
- Chairman Russell called for a motion to appoint Ms. Orr as the permanent hearings examiner. Mr. Rossbach so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.
- IV. General Public Comment
- Chairman Russell called for general public comment.
- Commissioner Schneider testified in favor of the mercury rulemaking.
- Mr. Parker spoke against the mercury rulemaking.
- V. Adjournment
- The meeting adjourned at 11:42 a.m.

Board of Environmental Review June 2, 2006, minutes approved:


JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW
9/15/2008
DATE